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No. 95-776

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

RUTH CISNEROS,

Petitioner,

v.

THE U.D. REGISTRY, INC., THE APARTMENT ASSOCIATION OF GREATER LOS ANGELES,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal Of California, Second Appellate District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES BELOW

Respondent respectfully disagrees with Petitioner's characterization that the State of California and Daniel E. Lungren, as Attorney General of California, were not parties to the appellate proceedings. While they did not actively participate, they were parties. In fact, the Court of Appeal's decision identifies them as defendants. As stated in the decision, there merely was "No appearance for defendant" before the Court of Appeal. Petition at page 1a.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The Apartment Association of Greater Los Angeles ("Respondent") hereby responds to the Petition for Writ of Certiorari ("Petition") filed by Petitioner Ruth Cisneros ("Petitioner"). Respondent respectfully requests that this Court deny the Petition.

Review by this Court is unnecessary because (a) the decision of the California Court of Appeal[1] does not conflict with any decision of any other state court of last resort or of a United States court of appeals, and (b) the issue resolved by the California Court of Appeal does not conflict with any decision of this Court but rather, as found by the California Court of Appeal, was dictated by this Court's previous decisions.[2]

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[1] The opinion of the California Court of Appeal is reported at 34 Cal. App. 4th 107, 40 Cal. Rptr. 2d 228 (1995). A copy is included as an appendix to the Petition.

[2] *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 99 S.Ct. 2667, 61 L.Ed.2d 399 (1979); *The Florida Star v. B.J.F.*, 491 U.S. 524, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989). *See, also, United States v. Aguilar*, ___ U.S. ___, 115 S.Ct. 2357, 2365, ___ L.Ed.2d ___ (1995) ("It is true that the government may not generally restrict individuals from disclosing information that lawfully comes into their hands in the absence of a "state interest of the highest order.").

I. RESPONSES TO "QUESTIONS PRESENTED" BY PETITIONER.

Respondent briefly responds to Petitioner's "Questions Presented" as they have been specifically framed by her. Respondent will, *infra*, provide responses in greater detail to the actual arguments presented in the Petition.

A. Petitioner's Question No. 1.

> Whether a state Legislature may, consistent with the First Amendment, exclude from credit reports information concerning eviction actions that tenants have won or that are pending, settled or dismissed, when the Legislature concludes that inclusion of such information results in the unfair denial of housing to prospective tenants.

Response To Petitioner's Question No. 1.

First, the reports involved here are scarcely "credit reports" as that term is commonly understood. The reports contain no confidential information culled from bank accounts, credit card balances, loan payments, or interviews with neighbors. They are merely compilations of information from publicly-available court files in the California Municipal and Superior Courts involving unlawful detainer actions. The reports do not even contain any information regarding the particular allegations made in the actions. They report only the existence of the legal action and its resolution, if any. Thus, any judicial determination of the First Amendment protections accorded to these types of reports would not necessarily

apply to usual "credit reports." Use of the term "credit reports" in the "Question Presented" to describe the reports herein is overbroad.

To avoid confusion, Respondent will hereafter refer to the reports at issue here as "tenant screening reports."

Second, the Question Presented is factually in error as the California Legislature did not "conclude that inclusion of such information results in the unfair denial of housing to prospective tenants." The only statement of purpose adopted by the California Legislature in connection with the Statute was that "[t]he purpose of this bill is to prevent a meritless eviction lawsuit from being included in a consumer credit report."[3] The statement referenced by Petitioner in her "Question Presented" is contained only in a section of the legislative report wherein the report recites, without adopting, the arguments presented by others in favor and against the Statute.

Finally, the Question Presented as phrased discloses an alternate ground for the decision which could prevent this Court from reaching the issues presented by Petitioner. In the defense of the statute[4] Petitioner and the State of California have relied solely upon the presumptions of constitutionality and correctness given to ordinary legislation. However, as discussed *infra*, legislation

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[3] Petition at page 27a. A prohibition of the reporting of all unlawful detainer actions to accomplish the purpose of preventing the reporting of a few meritless actions is hopelessly overbroad and is not reasonably tailored to accomplish its purpose.

[4] California Civil Code § 1785.13(a)(3) (hereinafter the "Statute").

imposing restraints on free speech is not accorded such legislative deference and, instead, the burden of proof is on those defending the legislation to affirmatively show facts supporting the elements required by this Court for lawful restraints on speech. Neither Petitioner nor the State of California have presented any of this required evidence. Their failure to do so is reflected in the particular wording of this Question.

This defect in Petitioner's case was not a factor in the decision below, as the California Court of Appeal found the Statute unconstitutional on substantive grounds rather than on the absence of the required proof by Petitioner and the State of California. However, any review by this Court for the purpose of anything more than affirming the ruling of the court below would necessarily involve, and be determined by, this absence of evidence.

B. Petitioner's Question No. 2.

> Whether private consumer credit reports receive full First Amendment protection like that accorded "robust debate on public issues," or whether they receive intermediate First Amendment scrutiny like that accorded commercial speech or speech on matters of private concern.

Response to Question No. 2.

In the phrasing of this Question, Petitioner has merged three separate First Amendment doctrines, two of which are not raised in this action.

First, the "robust debate on public issues" doctrine arises in cases of false speech where the Court must balance the harm arising from the false speech with the breathing space to be accorded false speech made in the heat of public debate.[5] The doctrine is based on the concept that uninhibited, robust debate often includes statements which, upon more careful reflection, may not have been entirely truthful. The doctrine has no application to the truthful speech involved herein.

Second, the "speech on matters of private concerns" has been applied only to cases involving issues not raised herein. This case does not, for example, involve false speech (where the issue of "private concern" is considered in the determination of the public debate value of the false speech) or governmental employment (where the issue of "private concern" is considered in the determination of whether a government employee may constitutionally be disciplined for speech deemed harmful to the purposes of his or her governmental employment). The arguments submitted by Petitioners urging the use of the "private concern" theory rely solely on judicial decisions involving either one or the other of these two irrelevant subissues.

II. JURISDICTION.

This case may raise a jurisdictional issue regarding the application of the doctrine of independent state law

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[5] *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

grounds. In this action, Respondent challenged the constitutionality of the Statute on both federal and state constitutional grounds. However, the decision of the California Court of Appeal was silent as to the separate effect of Article 1, section 2(a) of the California Constitution.

Article 1, section 2(a) of the California Constitution provides,

> [e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

This section has been held by the California Courts to include the free speech protections of, and be more protective than, the First Amendment to the United States Constitution. *See, e.g., Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 153 Cal. Rptr. 854, 592 P.2d 341 (1979), *aff'd*, 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980).

Thus, Article 1, section 2(a) should be an independent state ground for the decision. In the absence of any specific references by the California Court of Appeal to the State Constitution, this Court has jurisdiction to consider the federal question. However, any ultimate determination by this Court contrary to the decision of the California courts would require a remand to the California courts for consideration of California law.

III. ARGUMENT AGAINST GRANTING THE WRIT OF CERTIORARI.

A. This Court Has Previously Rejected Certiorari Involving The Same Underlying Issue.

Respondent respectfully notes that this Court previously denied certiorari in an action involving the same issue applied to even broader restrictions by the State of Maine on actual credit reports. *Equifax Services, Inc. v. Cohen*, 420 A.2d 189 (Me. 1980), *cert. denied*, 450 U.S. 916, 101 S.Ct. 1368, 67 L.Ed.2d 342 (1981). Therein, the Maine Supreme Court had held a state law imposing certain restrictions on credit reports was an unconstitutional restraint on First Amendment rights. The Maine Court assumed that credit reports were "commercial speech," and yet it nonetheless struck down the law on the grounds that the prohibitions in the law were so overbroad that they prohibited even the accurate reporting of public record information. The Maine court thus held that the law failed to meet the test for "commercial speech" restrictions set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980).

This case involves issues far more limited than those raised in *Equifax Services*. The "public records" involved here are publicly-available court records, the reporting of which has been specifically protected by this Court, and the "credit reports" involved here are limited only to information from these court records.

B. Certiorari Is Not Required To Determine Whether Credit Reports Are "Commercial Speech."

Petitioner contends that this Court should grant certiorari to resolve the question of whether credit reports fall within the "commercial speech" doctrine of the First Amendment. First, as set forth in the Court of Appeal's decision, this is no longer an open question. Second, even if it were, this case does not necessarily present that issue to the Court.

1. Whether Credit Reports Are "Commercial Speech" Is Not An Open Question.

The definition of "commercial speech" is speech that "proposes a commercial transaction." This Court has held that the "proposal" of a commercial transaction is not limited to actual offers to sell, such as the pharmacy advertisements in *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976), but that a "proposal" includes ordinary promotional materials,[6] including commercials,[7] signs,[8] Tupperware parties,[9] and product labels.[10]

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[6] *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, supra.*

[7] *United States v. Edge Broadcasting Co.*, ___ U.S. ___, 113 S.Ct. 2696, ___ L.Ed.2d ___ (1993).

[8] *Linmark Associates, Inc. v. Willington*, 431 U.S. 85, 97 S.Ct. 1614, 50 L.Ed.2d 155 (1977); *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986).

[9] *Board of Trustees v. Fox*, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989).

[10] *Rubin v. Coors*, ___ U.S. ___, 115 S.Ct. 1585, ___ L.Ed.2d ___ (1995).

This Court addressed the question of whether credit reports were "commercial speech" in *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985). There, the Court expressly stated that it was not holding that credit reports were "commercial speech."[11] In fact, four dissenting justices believed that such reports were definitely not commercial speech.[12]

For her argument, Petitioner relies solely on a phrase used by this Court describing "commercial speech" as speech which is "related solely to the economic interest of the speaker and its audience."[13] From this language, Petitioner concludes that any speech which is solely in the economic interest of the reader is commercial speech. This is not the result intended by the Court in *Hudson Central*. Indeed, Petitioner's new definition of "commercial speech" would result in lessened constitutional protection for the financial pages of newspapers, most of the Wall Street Journal, and even, as conceded by Petitioner's counsel at oral argument before the Court of Appeal, the magazine "Consumer Reports".

This Court has already rejected Petitioner's contention that any speech relating to the economic interests of the listener is, *a fortiori*, "commercial speech." In *Board of Trustees v. Fox, supra*, the Court considered the difference between Tupperware parties (which it held were commercial speech) and job counseling (which it held was not

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[11] 472 U.S. at 762, n.8.

[12] 472 U.S. at 790 (dissenting opinion).

[13] *Central Hudson Gas & Electric Corp. v. Public Service Comm'n, supra*, 447 U.S. at 561.

commercial speech). Job counseling, although obviously related to the economic interest of the speaker and its audience, was determined not to be commercial speech for the simple reason that it did not propose a commercial transaction.[14]

2. This Case Does Not Necessarily Raise The Question Of Whether Tenant Screening Reports Are Commercial Speech.

Even if the question of whether credit reports are "commercial speech" were unresolved, this case does not necessarily raise that issue.

First, tenant screening reports are sufficiently different from ordinary credit reports that any determination here with regard to the tenant screening reports would leave lingering questions regarding actual credit reports.

Second, the question of whether the tenant screening reports are "commercial speech" may not be reached in this case. The trial court, for example, ruled that the Statute was unconstitutional under this Court's previous rulings regardless of whether or not the tenant screening reports were "commercial speech." Indeed, in *Equifax Services*, the Maine Supreme Court assumed that the credit reports were "commercial speech" and nonetheless struck down the statute under the *Central Hudson* test.

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[14] 492 U.S. at 482 ("While these examples consist of speech for a profit, they do not consist of speech that *proposes* a commercial transaction, which is what defines commercial speech." (emphasis in original)).

Finally, as set forth below, neither the State nor Petitioner produced any of the evidence required by this Court to validate legitimate restrictions on even "commercial speech."

3. There Is No Evidence To Support Any Claim That The Statute Is A Lawful Restraint On Free Speech.

In First Amendment cases, the burden is on the government to prove the elements necessary to justify a restraint on speech, regardless of whether or not the speech is "commercial speech."

Moreover, this burden is not satisfied by the mere presumptions ordinarily given to legislative enactments. In *Edenfield v. Fane*, ___ U.S. ___, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) *supra*, the Court held that,

> [t]his burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree. [citations omitted] Without this requirement, a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.

Id., 113 S.Ct. at 1800.

In the instant case, there is no evidence of any meritless unlawful detainer cases filed by landlords.[15] There is no evidence that any such cases have prejudiced anyone in obtaining housing. There is no evidence that any tenant screening reports have resulted in unfair boycotting of tenants or has resulted in the exclusion of anyone from housing. Finally, there is no evidence that the Statute promotes its purported goals.

The entire evidence in this case is contained in the stipulated facts set forth in the Petition at pages 15a to 40a, and much of even this is not admitted evidence.[16]

C. The Conceptual Scheme Of The Statute Is Contrary To The Fundamental Principles Of The First Amendment.

From an overview, the decision of the California Court of Appeal is obviously correct and requires no review.

The California Legislature perceived a problem which it wished to redress. However, rather than directly attack the problem, the Legislature chose to accomplish its goal by the device of keeping the public ignorant of

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[15] It was stipulated that some dismissed cases would have been won by landlords and some by tenants, but there was no evidence that any of them were meritless. Petition at pages 18a-19a.

[16] The stipulation relates only to the authenticity of exhibits F through I. It does not stipulate to their admissibility. Indeed, the question of admissibility is expressly reserved. Petition at page 21a. These exhibits are clearly inadmissible hearsay and were neither offered nor admitted as evidence at trial.

certain truthful information. This Court has repeatedly rejected this type of "paternalistic approach."[17] The basic scheme adopted by the California Legislature for accomplishing its goal is inimical to the First Amendment.

This is not to say that the California Legislature could not have accomplished its desired goals by other methods. As the California Court of Appeal concluded,

> there are any number of things the State may lawfully do to protect renters who are subject to or who have suffered an eviction. What it cannot do is to act in violation of the Constitution.

Petition at page 13a.

IV. CONCLUSION.

For the foregoing reasons, Respondent respectfully requests the Court deny the Petition for Writ of Certiorari.

Dated: December ___, 1995

Respectfully submitted,

STEPHEN L. JONES
Attorney for Respondent
Apartment Association of
Greater Los Angeles

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[17] *See, e.g., Virginia Pharmacy Board v. Virginia Consumer Council, supra,* 425 U.S. at 769-70.